EV 00-0175-C H/H Utica Mutual Ins v. Vigo Coal
Judge David F. Hamilton Signed on 3/20/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UTICA MUTUAL INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
VIGO COAL COMPANY INC -	)	
DEFT/CROSS-CLAIM PLTF,	)	
KOESTER, WILLIAM L -	)	
DEFT/CROSS-CLAIM PLTF,	)	
KOESTER, BETTY L -	)	
DEFT/CROSS-CLAIM PLTF,	)	
ATLAS MINERALS INC,	)	CAUSE NO. EV00-0175-C-H/H
PIEPER, WALTER J -	)	
DEFT/CROSS-CLAIM DEFT,	)	
PIEPER, SUSAN S,	)	
SCHULTIES, CHARLES W -	)	
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Defendants.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UTICA MUTUAL INSURANCE COMPANY, Plaintiff, v. VIGO COAL COMPANY, INC., WILLIAM L. KOESTER, BETTY L. KOESTER, ATLAS MINERALS, INC., WALTER J. PIEPER, SUSAN S. PIEPER, and CHARLES W. SCHULTIES, Defendants.	)	CAUSE NO. EV 00-175-C H/H

ENTRY ON MOTIONS FOR SUMMARY JUDGMENT AND
MOTION TO DISMISS COUNTERCLAIMS

When several owners of the Buck Creek coal mine in Sullivan County, Indiana (the "Vigo defendants") sold their interest in the mine, the buyers (the "Atlas defendants") agreed to use their best efforts to obtain a release of the sellers' liability on indemnification agreements for coal mining reclamation bonds. No such express release was ever obtained. The Indiana Department of Natural Resources later forfeited the bonds, and the bonding company, plaintiff Utica Mutual Insurance Company, demanded payment from its indemnitors. When payments were not forthcoming, Utica Mutual brought this diversity case

to enforce all available indemnity agreements against both the buying Atlas defendants and the selling Vigo defendants.

The case is before the court on cross-motions for summary judgment on the legal effect of the indemnity agreements. For the reasons explained below, the court grants Utica Mutual's motion for summary judgment against the Atlas defendants, denies Utica Mutual's motion for summary judgment against the Vigo defendants, denies the motion for summary judgment filed by the Vigo defendants, grants Utica Mutual's motion to dismiss counterclaims of the Atlas and the Vigo defendants, and grants in part and denies in part the motion to strike portions of the affidavit of Frank Madia. The Atlas defendants have offered no defense to their indemnity agreements. As for the Vigo defendants, however, when the evidence is viewed through the summary judgment lens, there are factual disputes as to whether Utica Mutual effected a novation that released the Vigo defendants from their earlier indemnification agreements.

Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate when there are no genuine issues of material fact,

leaving the moving party entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party must show there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A factual issue is material only if resolving the factual issue might change the suit's outcome under the governing law. *Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). A factual issue is genuine only if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50.

Undisputed Facts

The following facts are undisputed or reflect the record evidence in the light reasonably most favorable to the defendants. Buck Creek Coal, Inc. (Buck Creek) operated an underground coal mine in Sullivan County, Indiana. Under Indiana law, coal mining companies must post a bond with the Indiana Department of Natural Resources to ensure payment for reclamation of the land to be mined. See Ind. Code § 14-34-6-1, formerly § 13-4.1-6-1. Plaintiff Utica Mutual Insurance Company (Utica Mutual) is a surety company that provides

such bonds in exchange for the payment of premiums. Utica Mutual issued several such bonds for Buck Creek from 1987 to 1995.

As a condition of issuing the bonds, Utica Mutual also requires mine owners and operators to agree to indemnify Utica Mutual against any loss incurred under the bonds. Under this arrangement, the state government accepts the credit of an established insurance company, while the insurance company may evaluate for itself the credit of the mine owners and operators. In essence, the state is assured of payment for reclamation costs, and the surety company is paid for taking upon itself the credit risk regarding the mine owners and operators.

I. *The 1991 Agreement*

In 1991, Vigo Coal Company, Inc. (Vigo Coal) owned by William and Betty Koester, purchased an interest in Buck Creek. At the time of the purchase, Atlas Minerals, Inc., owned by Walter and Susan Pieper, also held an interest in Buck Creek. On August 21, 1991, Buck Creek, Vigo Coal, Atlas Minerals, William Koester, Betty Koester, Walter Pieper, and Susan Pieper signed a General Agreement of Indemnity (the "1991 agreement") to indemnify Utica Mutual on its bonds executed on behalf of Buck Creek. Utica Mutual, through Mark Jones of

M–J Insurance, then replaced the bonds issued under the prior owners (totaling roughly $700,000) with new bonds in the same amount.

The 1991 agreement provides for the indemnification of Utica Mutual for "every claim, demand, liability, cost, charge, suit, judgment, and expense" that it incurs as a consequence of having executed a bond on behalf of Buck Creek. Paragraph 16 provides that the agreement covers all bonds that Utica Mutual executes on behalf of Buck Creek and that the indemnitors' liability continues for an "indefinite period of years until this agreement shall be canceled in accordance with the terms hereof." Paragraph 16 states in full:

> THE INDEMNITORS HEREBY ACKNOWLEDGE THAT THIS AGREEMENT IS INTENDED TO COVER WHATEVER BONDS, WHETHER OR NOT COVERED BY ANY APPLICATIONS SIGNED BY ANY ONE OR MORE OF THE INDEMNITORS WHICH MAY BE EXECUTED BY THE COMPANY ON BEHALF OF THE INDEMNITORS, OR ANY ONE OF THEM, FROM TIME TO TIME, AND OVER AN INDEFINITE PERIOD OF YEARS UNTIL THIS AGREEMENT SHALL BE CANCELED IN ACCORDANCE WITH THE TERMS HEREOF.

The termination provision appears in Paragraph 14:

> This Agreement may be terminated by the Indemnitors, or any one or more of the parties so designated, upon written notice sent by registered mail to the Home Office of the Company, P.O. Box 530, Utica, New York, 13503, of not less than twenty (20) days, but any such notice of termination shall not operate to modify, bar or discharge the liability of any party hereto, upon or by reason of any and all such obligations that may then be in force.

Thus, to avoid any liability for future bonds issued on behalf of Buck Creek, the indemnitors were required to send written notice of termination to Utica Mutual. But even sending a notice of termination would not discharge an indemnitor's liability for bonds that Utica Mutual had issued prior to receiving the written notice.

II. *The 1992 Agreement*

In 1992, Vigo Coal and the Koesters sold their interest in Buck Creek to Charles Schulties and Walter Pieper. As part of the purchase agreement, buyers Schulties and Pieper agreed "to use their best diligent efforts to replace said [coal reclamation] bonds at their sole expense and to obtain a release of Sellers and Sellers' Affiliates from all liability thereunder." Buck Creek Purchase Agreement ¶ 4 (Jan. 8, 1992).

The intermediary in all transactions between Buck Creek and its various owners and Utica Mutual was M–J Insurance, Inc., which acted as Utica Mutual's agent under a written agency agreement authorizing M–J to issue reclamation bonds of up to $1 million each. Mark Jones was the M–J agent who actually handled the Buck Creek transactions.

In connection with the 1992 sale, Jones submitted a "Reclamation Bonding Application" to Utica Mutual for the new group of owners. Jones wrote a memorandum in support of the application and sent it to Utica Mutual's Jerry Swarthout, the bond manager who handled Buck Creek's account. Jones Dep. at 12-13. The contents of the application and memorandum are set forth below in the discussion of the novation issue.

On June 17, 1992, Buck Creek, Walter Pieper, Susan Pieper, and Charles Schulties signed a General Agreement of Indemnity (the "1992 agreement") to indemnify Utica Mutual on the bonds it had issued and would issue on behalf of Buck Creek. The material terms of the 1992 agreement were identical to those of the 1991 agreement quoted above. Vigo Coal and the Koesters were not parties to the 1992 agreement. In contrast to the actions taken after Vigo Coal's purchase of Buck Creek in 1991, after the 1992 transactions were completed, Utica Mutual did not replace the bonds issued before the 1992 sale with new bonds. Utica Mutual later issued additional bonds on behalf of Buck Creek in June 1992 and February 1993.

Utica Mutual never issued any written document releasing Vigo Coal or the Koesters from the 1991 agreement indemnifying Utica Mutual against losses on the existing or future bonds. There is also no evidence that Vigo Coal or the

Koesters ever provided notice of termination of the 1991 agreement pursuant to the terms of Paragraph 14.

Buck Creek encountered serious business difficulties. In October 1998, the Indiana Department of Natural Resources revoked Buck Creek's mining permit and forfeited the bonds to the State of Indiana. At the time of the forfeiture, Utica Mutual had issued four reclamation bonds to the Indiana Department of Natural Resources on behalf of Buck Creek Coal, in an amount in excess of $800,000. As a result of the forfeiture, Utica Mutual alleges that it has incurred costs and expenses in an amount in excess of $450,000. Utica Mutual made demand on all defendants for indemnification. When its demands were not satisfied, Utica Mutual sued all the indemnitors, asserting that all the indemnitors under both the 1991 and 1992 agreements are liable to indemnify it for all of its losses on the Buck Creek reclamation bonds. Other facts are noted below – especially those relevant to the Vigo defendants' novation defense – viewing the evidence in the light reasonably most favorable to the Vigo defendants.

Discussion

I. *Utica Mutual's Claims Against the Atlas Defendants*

The Atlas defendants are Atlas Minerals, Walter Pieper, Susan Pieper, and Charles Schulties, who are the indemnitors in the 1992 agreement. The Atlas defendants did not respond to Utica Mutual's motion for partial summary judgment. Utica Mutual's motion for summary judgment against the Atlas defendants is granted for the reasons set forth in Utica Mutual's motion. Under the plain language of the 1992 agreement, Utica Mutual is entitled to recover from the Atlas defendants Utica Mutual's costs and expenses incurred to date resulting from those defendants' breach of their indemnity agreements, as well as future costs, expenses, and damages in the future. Such amounts shall be determined at trial.

II. *Utica Mutual's Claims Against the Vigo Defendants – Novation*

The Vigo defendants are Vigo Coal, William Koester, and Betty Koester. They are the indemnitors in the 1991 agreement who were not also parties to the 1992 agreement. The Vigo defendants contend that when they sold their interest in Buck Creek to the Atlas defendants in 1992 and the Atlas defendants executed the 1992 indemnification agreement with Utica Mutual, the transaction effected a "novation" that cancelled the Vigo defendants' obligations to Utica

Mutual. The Vigo defendants have filed a cross-motion for partial summary judgment and a motion to strike portions of the affidavit of Frank L. Madia.[1]

The Vigo defendants recognize that, under the plain language of the 1991 agreement, they are liable for indemnification unless the 1992 transactions between Utica Mutual and the Atlas defendants effectively terminated the Vigo defendants' obligations under the 1991 agreement. The Vigo defendants argue that the 1992 agreement was a clear and unambiguous novation of the 1991 agreement. Utica Mutual argues that the 1992 agreement was not a novation of the 1991 agreement, but merely provided additional security to Utica Mutual in consideration for its agreement to execute additional bonds on behalf of Buck Creek.

In this diversity action, the court applies federal procedural law and state substantive law. *Allen v. Cedar Real Estate Group, LLP*, 236 F.3d 374, 380 (7th Cir. 2001) (applying Indiana contract law), citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The parties agree that the substantive law of Indiana applies here. Under Indiana law, the court interprets indemnity agreements

[1]The Vigo defendants' motion to strike portions of the Frank Madia affidavit is granted with respect to the specified portions of Paragraphs 4-7, 16, and 17, and denied in all other respects.

according to the general rules of contract construction. *TLB Plastics Corp. v. Procter & Gamble Paper Prods. Co.*, 542 N.E.2d 1373, 1377 (Ind. App. 1989).

Parties to a contract are always free to release one another from their obligations or to substitute a new contract for an existing one. A novation is a special type of substituted contract in which the parties agree that a new obligor will perform duties while the original obligor is released from performing those duties. See, *e.g.*, *Boswell v. Lyon*, 401 N.E.2d 735, 741 (Ind. App. 1980) (novation means the substitution of one obligor for another by mutual agreement of the parties); Restatement (Second) of Contracts § 280 (1981) (novation is "a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty").

To create a novation, there must be "(1) a valid existing contract, (2) the agreement of all parties to a new contract, (3) a valid new contract, and (4) an extinguishment of the old contract in favor of the new one." *SSD Control Technology v. Breakthrough Technologies, Inc.*, 685 N.E.2d 1136, 1138 (Ind. App. 1997). "Where a subsequent agreement lacks any language, either express or implied, which indicates an intention to create a novation, relieve contractual liabilities, substitute parties, or extinguish the old contract," the court will not conclude that a party to the first contract has waived its right to sue for breach

of the first contract. *Id.*, citing *White Truck Sales of Indianapolis, Inc. v. Shelby National Bank*, 420 N.E.2d 1266, 1271 (Ind. App. 1981).

A novation is never presumed under Indiana law, and there must be evidence of "a clear, definite intention on the part of all concerned that such is the purpose of the agreement." *J.B. Speed & Co. v. Traylor*, 173 N.E. 461, 464 (Ind. App. 1930). However, express words need not always be present to indicate the assent to and acceptance of the terms of a substituted contract or novation. The intent "may be implied from the facts and circumstances surrounding the transaction and the conduct of the parties thereafter." *Rose Acre Farms, Inc. v. Cone*, 492 N.E.2d 61, 68 (Ind. App. 1986) (finding implied novation or substitution as a matter of law), citing *Armour & Co. v. Anderson*, 51 N.E.2d 496, 497 (Ind. App. 1943) (also finding implied novation or substitution as a matter of law).

The relevant intent, whether express or implied, is the obligee's intent not merely to allow a delegation of a duty but actually to release the first obligor and to seek performance only from the party allegedly substituted. See *White Truck Sales*, 420 N.E.2d at 1271. The authors of the Restatement (Second) of Contracts made this point in comment (d) to Section 280, distinguishing between a novation and a mere delegation of a contractual duty:

> However, a mere promise by a third party to assume the obligor's duty, not offered in substitution for that duty, does not result in a novation, and the new duty that the third party may owe to the obligee as an intended beneficiary is in addition to and not in substitution for the obligor's original duty. For a novation to take place, the obligee must assent to the discharge of the obligor's duty in consideration for the promise of the third party to undertake that duty.

Thus, when confronted with a novation defense, courts in Indiana and elsewhere have insisted on clear evidence of the obligee's intent to release the obligor of his obligations under the original contract. See, *e.g.*, *Modern Photo Offset Supply v. Woodfield Group*, 663 N.E.2d 547, 551 (Ind. App. 1996) (reversing trial court's finding of novation where no intent to release original obligor); *White Truck Sales*, 420 N.E.2d at 1271 (affirming judgment finding no novation where second agreement did not mention novation or otherwise indicate intent to release original obligor); *Boswell v. Lyon*, 401 N.E.2d 735, 742-43 (Ind. App. 1980) (rejecting novation defense as a matter of law where no intent to release was shown); see also *CH2M Hill Central, Inc. v. Madison-Madison Int'l, Inc.*, 895 F.2d 286, 291-92 (7th Cir. 1989) (applying common law standard under Wisconsin law, affirming summary judgment finding no novation); *In re Integrated Resources Life Ins. Co.*, 562 N.W.2d 179, 182 (Iowa 1997) (reversing finding of novation; no indication of intent to release original obligor); *Security Benefit Life Ins. Co. v. FDIC*, 804 F. Supp. 217, 225-29 (D. Kan. 1992) (granting summary

judgment rejecting novation defense where evidence did not show clear understanding to release original obligor).

The Vigo defendants base their novation defense on the 1992 agreement itself, as well as the "Reclamation Bonding Application" submitted to Utica Mutual by M–J Insurance agent Mark Jones on behalf of the new owners of Buck Creek, dated April 21, 1992, and Jones' memorandum to Jerry Swarthout of Utica Mutual dated April 22, 1992. The Vigo defendants also base their novation argument on Jones' testimony, the practices in the coal bonding business, and the business sense of the entire transaction.

Turning first to the relevant documents, the Vigo defendants rely on Paragraph 22 of the Reclamation Bonding Application. When Vigo Coal and the Koesters sold their interest in Buck Creek to William Pieper and Charles Schulties, Buck Creek submitted the Reclamation Bonding Application to Utica naming the new owners as indemnitors. Paragraph 22 of the application stated: "List below any signed endorsement(s) (indemnity) which is available to support this firm." In response, Buck Creek listed only Walter Pieper and Charles W. Schulties. The application did not list the Vigo defendants as retaining their roles as indemnitors after they had sold their interest in Buck Creek.

Second, when Jones of M–J Insurance sent Buck Creek's Reclamation Bonding Application to Utica Mutual, he sent a cover memorandum that stated in pertinent part:

> Enclosed please find the updated financial statements on Buck Creek Mining, Inc., Buck Creek Coal, Inc. and both personal indemnitors, Walter Pieper and Chuck Schulties. . . . Not only does Mr. Schulties bring substantial experience, but also his financial statement shows liquid assets in excess of $2,000,000.
>
> As this is an underground mine, there is substantially less reclamation liability and with the personal indemnity of Chuck Schulties, Walter Pieper and his wife, along with the corporate indemnity, I believe this would be a good account for Utica.
>
> We currently write these bonds, as Vigo posted them when they were a partner to this enterprise. As the bonds are already in place, all we really need to do is transfer these bonds over and have new Indemnity Agreements signed by Chuck Schulties.

The Vigo defendants emphasize the inclusion of Schulties' liquid assets in the memorandum and Jones' suggestion that all Utica needed to do was "have new Indemnity Agreements signed by Chuck Schulties." Vigo Reply Br. at 2-3. Jones' memorandum also said that Vigo and the Koesters were no longer "a partner to this enterprise," which, as discussed below, is a status not obviously compatible with remaining as indemnitors.

The Vigo defendants also infer a novation from the fact that some indemnitors under the 1991 agreement were also indemnitors under the 1992

agreement. The Vigo defendants argue that Utica Mutual would require the same parties to sign the 1992 agreement only because Utica Mutual believed and intended that the 1991 agreement was no longer enforceable against them.

These documents are all consistent with the Vigo defendants' novation defense, but they do not plainly express an intent by Utica Mutual to accept the novation and to release the Vigo defendants from the 1991 agreement. The omission of the Vigo defendants from Paragraph 22 is consistent with a novation defense but by itself falls short of expressing an actual intent to release the indemnitors. Similarly, Jones' memorandum focusing on Schulteis' assets is consistent with an intent to create a novation, though it does not clearly express that intent. Schulties' assets were relevant to the Reclamation Bonding Application regardless of whether or not Buck Creek intended a novation. Similarly, it was in Utica Mutual's best interest to obtain new indemnity agreements including Schulties as an indemnitor regardless of whether a novation was intended.

Supporting the documentary evidence is Mark Jones' testimony and the business realities of these transactions. Jones testified that, if the 1992 agreement had not been a novation releasing the Vigo defendants from the 1991 agreement, he simply would have found another bonding company to write

replacement bonds for Buck Creek, indemnified by the new owners. In that case, Jones would have cancelled the Utica Mutual bonds covered by the 1991 agreement. Jones Dep. at 16-19.[2]

That is a reasonable view of the business reality, and courts are not barred by applying some practical business sense when resolving commercial contract issues, whether a court is interpreting written language or business behavior. See, *e.g.*, *Beanstalk Group, Inc. v. AM General Corp.*, — F.3d —, —, 2002 WL 406985, *2-3 (7th Cir. March 15, 2002) (contracts should be interpreted on the assumption that the parties are rational persons pursuing rational ends); *Hartford Fire Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 280 F.3d 744, 747-48 (7th Cir. 2002) (employing rebuttable presumption that parties to contract would not agree to economically irrational results); *Rhode Island Charities Trust v. Engelhard Corp.*, 267 F.3d 3, 7 (1st Cir. 2001) ("There is a long tradition in contract law of reading contracts sensibly; contracts – certainly business contracts of the kind involved here – are not parlor games but the means of getting the world's work done. . . .").

[2]Utica Mutual contends that Jones and M–J Insurance had authority only to issue bonds, not to cancel indemnification agreements. On this record, the scope of at least their apparent authority presents an issue of disputed fact, so the court must give the Vigo defendants the benefit of the doubt on the issue.

It would have made no business sense at all for the Vigo defendants to have remained liable for unlimited future bonds for the benefit of a company they no longer owned or controlled. Few rational business-people would knowingly accept such an unlimited, unknown, and uncontrollable risk without any potential for gain. If a novation was not intended, then, at the very least, the sensible thing for the Vigo defendants to have done would have been to give formal notice of termination so as to bar obligations on future bonds. They never did so.

As Jones testified, it would have been easy to effect a release of the Vigo defendants' obligations by turning to one of Utica Mutual's competitors to issue replacement bonds as part of the 1992 transaction. In that event, the Utica Mutual bonds would have been cancelled, which would also have protected the interests of the Vigo defendants but would have left Utica Mutual out of the deal. The fact that Jones did not turn to a competitor is some additional evidence in favor of the novation defense.

In sum, the documentary evidence is consistent with the novation theory, though the documents do not compel its acceptance, and Jones' testimony and common sense tend to support the implied novation defense. The evidence would allow a reasonable jury to find that Jones intended, acting as Utica Mutual's

agent, to release the Vigo defendants from the 1991 agreement by replacing their indemnifications with that of Schulties as part of the 1992 sale of the Vigo defendants' interest in Buck Creek, and that Jones and the defendants were merely sloppy in completing the paperwork to effect that intention.

Utica Mutual points out that Paragraph 14 of the 1991 agreement provided a clear mechanism for terminating new obligations under it, and that the Vigo defendants never invoked that mechanism. From Utica Mutual's point of view, the Vigo defendants' failure to terminate the 1991 agreement shows that they never obtained a release and should have expected to remain liable. The failure supports another reasonable inference, however, and on summary judgment the non-moving parties are entitled to the benefit of the favorable inference.

From the Vigo defendants' point of view, the failure to cancel new obligations under the 1991 agreement is entirely consistent with their understanding that the 1992 agreement was a novation that cancelled all their existing obligations under the 1991 agreement, without any need for further action by them. If the 1992 agreement was not a novation, then the Vigo defendants' failure to act left them vulnerable to indemnify without limitation the obligations of a coal mining company they no longer owned, controlled, or influenced. If they thought they were still liable on the 1991 agreement for

existing bonds, the Vigo defendants should at the very least have given written notice of termination to avoid exposure to new liabilities totally beyond their control. Of course, the same evidence also allows the inference that the Vigo defendants were simply negligent in protecting their interests, but the choice among those inferences is for a trial, not summary judgment.[3]

There is also evidence that Utica Mutual itself, apart from its agent M–J Insurance, behaved in a way indicating that it viewed the 1992 agreement as a novation. In a letter to Utica Mutual dated March 28, 1995, Jones asked Utica Mutual to issue written releases for the Vigo defendants, saying that was what all parties had intended. See Def. Ex. 11. Jones then noted that Utica Mutual had not received any financial information from Vigo Coal and the Koesters for the past three years. The failure to seek such information can reasonably be interpreted as indicating that Utica Mutual had not been relying on the Vigo defendants' credit in taking any further actions with respect to Buck Creek.

[3]Utica Mutual seems to contend that the termination provisions of Paragraph 14 make it legally impossible for the parties to have agreed to a novation using any other form of communication or behavior. It is well established, however, that parties who make an agreement can agree to rescind it by other means. See *National American Ins. Co. v. Hogan*, 173 F.3d 1097, 1106-07 (8th Cir. 1999) (rejecting similar argument).

For all of these reasons, and viewing all the evidence in the light reasonably most favorable to the Vigo defendants, the court cannot say that no reasonable jury could find an implied novation in the 1992 agreement. Utica Mutual is not entitled to summary judgment against the Vigo defendants.[4]

The Vigo defendants have also moved for summary judgment on their novation defense and on their breach of contract counterclaim. Because novations are not presumed and are not easily implied, the Vigo defendants are not entitled to prevail on their defense as a matter of law. In the absence of undisputed evidence of more explicit expressions of intent to release the Vigo defendants from their obligations, the evidence is subject to reasonable inferences that favor Utica Mutual. The Vigo defendants' motion for summary judgment on their novation defense and breach of contract counterclaim is denied.

III. *Utica Mutual's Motion to Dismiss Counterclaims*

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[4]The court does not find persuasive Utica Mutual's argument that the Indiana statute of frauds applicable to revised or new credit agreements bars the Vigo defendants' novation defense. See Ind. Code § 32-2-1.5-5. First, it is not at all clear that the indemnification agreements being sued upon were extensions of credit from Utica Mutual to the indemnitors. Second, the statute by its terms applies only to a debtor's "action upon an agreement with a creditor," not to a debtor's or indemnitor's assertion of a defense to a claim asserted by a creditor or indemnitee.

The Vigo defendants have asserted counterclaims against Utica Mutual for breach of contract and breach of an obligation of good faith. Docket No. 62 at 4-8. The Atlas defendants have asserted a counterclaim against Utica Mutual solely for breach of contract. Docket No. 68 at 2; Docket No. 70 at 3. Utica Mutual has moved to dismiss all the counterclaims. Because Utica Mutual is entitled to summary judgment against the Atlas defendants on its own contract claim, it is also entitled to dismissal of the Atlas defendants' counterclaim.

The Vigo defendants' counterclaims for breach of contract (Counts I and II) fail to state a claim upon which relief can be granted. A party ordinarily does not breach a contract by suing to enforce what it believes are its rights under the same contract. To the extent that the Vigo defendants also base Count I upon the Indiana statute authorizing a fee award for pursuing frivolous claims, see Ind. Code § 34-52-1-1(b), the factual disputes and the strength of Utica Mutual's legal arguments against the novation defense undermine any assertion that Utica Mutual's claim is frivolous.

The Vigo defendants' counterclaim for bad faith liability in tort (Count III) is also subject to dismissal. The Vigo defendants seek to equate Utica Mutual's attempt to enforce their indemnification promises in the 1991 agreement with an insurance company's bad faith refusal to pay a valid claim, citing *Erie*

Insurance Co. v. Hickman, 622 N.E.2d 515 (Ind. 1993) (recognizing tort of bad faith denial of coverage). The Vigo defendants cite cases recognizing that a surety's failure to pay upon proper demand may be actionable for a bad faith refusal. See, *e.g.*, *Transamerica Premier Ins. Co. v. Brighton School Dist.*, 940 P.2d 348, 351-52 (Colo. 1997) (surety's refusal to pay claim on performance bond for construction contractor).

Those cases are not comparable, however, to this case. Utica Mutual has not refused to honor its surety obligations to the State of Indiana. It has instead sued to enforce the Vigo defendants' promises to pay certain amounts when conditions triggering their obligations are met and upon proper demand. In terms of *Erie Insurance v. Hickman*, the Vigo defendants' bad faith counterclaim would be most comparable to an insurance company asserting a bad faith counterclaim against an insured who sought to collect on an insurance policy he knew had been validly cancelled. The Vigo defendants have not shown that Indiana courts would extend *Erie Insurance v. Hickman* to such claims by insurers against their insureds. Even if Indiana law permitted such a theory, moreover, in view of the factual disputes and the strength of Utica Mutual's legal arguments against the novation defense, a reasonable jury could not find on this record that Utica Mutual acted in bad faith in seeking indemnification from the Vigo defendants.

Conclusion

The court grants Utica Mutual's motion for partial summary judgment as to liability against defendants Atlas Minerals, Inc., Walter J. Pieper, Susan S. Pieper, and Charles W. Schulties. The court denies Utica Mutual's motion for partial summary judgment as to liability against defendants Vigo Coal Company, Inc., William L. Koester and Betty L. Koester, and denies the Vigo defendants' motion for partial summary judgment against Utica Mutual. Utica Mutual's motion to dismiss all the defendants' counterclaims is also granted.

So ordered.

Date: March 20, 2002

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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